In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-14

JONATHAN O. COLE, SUPERINTENDENT,
BOSTON STATE HOSPITAL, ET AL,
APPELLANTS, (DEFENDANTS),

v.

LUCRETIA PETEROS RICHARDSON,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLEE

HAROLD HESTNES
STEPHEN H. OLESKEY
HALE AND DORR
28 State Street
Boston, Mass. 02109
Attorneys For Appellee

CIVIL LIBERTIES UNION
OF MASSACHUSETTS
3 Joy Street
Boston, Mass. 02114
Of Counsel

Blanchard Press, Inc., Boston, Mass. — Law Printers

INDEX

Table of Authorities

Cases

Constitutional Provisions

State Statutes

Other Authorities

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-14

JONATHAN O. COLE, SUPERINTENDENT, BOSTON STATE HOSPITAL, ET AL,
APPELLANTS, (DEFENDANTS),

v.

LUCRETIA PETEROS RICHARDSON,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLEE

Opinions Below

The first opinion of the statutory three-judge United States District Court for the District of Massachusetts is reported at 300 F. Supp. 1321 (D. Mass. 1969).[1] The judg-

[1] App. 58. The Appendix references will be noted as Jt. App. The references to the appendix contained in this brief will be noted App., *infra.*

ment and injunction of the three-judge District Court are printed in the appendix contained in this brief, *infra*, p. 62. The order of this Court vacating the judgment of the three-judge District Court is reported at 397 U.S. 238.[2] The second opinion of the three-judge United States District Court for the District of Massachusetts after remand is unreported.[3] The reinstated judgment and injunction of the three-judge District Court are also printed in the appendix to this brief, *infra*, p. 66.

Jurisdiction

This suit was brought under 28 U.S.C., § 1331, 1343, 2281 and 2284, as well as 42 U.S.C., § 1983, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States, to declare unconstitutional and enjoin enforcement of the provisions of the Massachusetts General Laws ch. 264, § 14, and to restore the plaintiff, Lucretia Peteros Richardson, to her duties at Boston State Hospital. The original judgment and injunction of the three-judge District Court declaring unconstitutional Mass. Gen. Laws ch. 264, § 14, and permanently enjoining the defendants from prohibiting the plaintiff from discharging her duties at Boston State Hospital, was dated June 26, 1969. Notice of appeal was filed by the defendants, Cole et al, in the United States District Court for the District of Massachusetts on July 30, 1969, and by the plaintiff on August 25, 1969. The defendants' first Jurisdictional Statement was filed on September 29, 1969 and the plaintiff's Jurisdictional Statement on October 24, 1969. This Court's decision vacating judgment and remanding to the United States District Court for the District of Massachusetts for a determination of mootness was entered March 16, 1970.

---

[2] App. 68.
[3] App. 63.

The reinstated judgment and injunction of the three-judge United States District Court for the District of Massachusetts was entered on July 1, 1970. The defendants' claim of appeal was filed with the District Court on July 31, 1970 and that appeal was docketed with this Court on September 29, 1970. This Court noted probable jurisdiction on June 14, 1971. The jurisdiction of the Supreme Court to review this judgment and injunction by direct appeal is conferred by 28 U.S.C., § 1253.

Constitutional Provisions, Statutes and Oaths Involved

Involved here are the First, Fifth and Fourteenth Amendments to the United States Constitution, and chapter 264, section 14, of the Massachusetts General Laws, upon which appellee's employment at Boston State Hospital was conditioned, which provides:

> Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his duties, shall take and subscribe to, under the pains and penalty of perjury, the following oath or affirmation:
>
> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."
>
> Such oath or affirmation shall be filed by the subscriber, if he shall be employed by the state, with the secretary of the commonwealth, if an employee of a county, with the county commissioners, and if an

employee of a city or town, with the city clerk or the town clerk, as the case may be.

The oath or affirmation prescribed by this section shall not be required of any person who is employed by the commonwealth or a political subdivision thereof as a physician or nurse in a hospital or other health care institution and is a citizen of a foreign county.

The statutory provisions and penalties under Massachusetts law to which appellee was subjected — Mass. Gen. Laws ch. 264, § 15 and ch. 268, § 1 — are set forth in the appendix to this brief, *infra*, pp. 56-58.

Questions Presented

1. Do the Massachusetts employees' loyalty statute and oath declared unconstitutional by the Court below violate, on their face and as applied, the freedoms of expression, association, belief and privacy guaranteed by the First and Fourteenth Amendments to the United States Constitution?

2. Are the Massachusetts employees' loyalty statute and oath declared unconstitutional by the Court below, on their face and as applied, overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

3. Do the Massachusetts employees' loyalty statute and oath declared unconstitutional by the Court below compel, on their face and as applied, future speech and conduct of public employees in violation of the First and Fourteenth Amendments to the United States Constitution?

4. Do the Massachusetts employees' loyalty statute and oath declared unconstitutional by the Court below violate, on their face and as applied, the due process clause of the Fourteenth Amendment in that they are unduly vague, uncertain and broad?

5. Do the Massachusetts employees' loyalty statute and oath declared unconstitutional by the Court below violate, on their face and as applied, the due process clause of the Fourteenth Amendment in that they provide for summary dismissal with no opportunity for a hearing?

6. Are the Massachusetts employees' loyalty statute and oath declared unconstitutional by the Court below severable into constitutional and unconstitutional portions?

Statement of the Case

The appellee, Lucretia Peteros Richardson, is a citizen of the United States and presently resides in New York, New York. At the time of the filing of her complaint and until on or about September 1, 1969, the appellee was a resident of the Commonwealth of Massachusetts.[1] Mrs. Richardson is a Sociologist by training and holds a M.S. degree in Sociology.[2] The appellant Cole is the Superintendent of Boston State Hospital, a state institution for the mentally ill, located in Boston, Massachusetts and the appellant Greenblatt is the Commissioner of the Department of Mental Health of the Commonwealth of Massachusetts, Boston, Massachusetts. The Department of Mental Health of the Commonwealth of Massachusetts has jurisdiction and control over Boston State Hospital.[3]

The appellee's employment by Boston State Hospital, pursuant to an oral agreement authorized by the appellee Cole, commenced on September 30, 1968, and continued until November 25, 1968. Appellee was assigned to a position at the hospital as an "Occupational Therapist" but in fact was to undertake a research project for the hospital.[4]

---

[1] Jt. App. 10, 19.
[2] Jt. App. 10.
[3] Jt. App. 10-11.
[4] App. 64; Jt. App. 11.

Appellee was not asked to subscribe to the provisions of any loyalty oath as a condition of her employment and payment by the appellants until November 15, 1968. On this date appellee was advised by agents of the defendants that she was required by statute to subscribe to the provisions of the oath contained in Massachusetts General Laws, ch. 264, § 14, as a condition of her continued employment.[5] Appellee informed the hospital's personnel department that she could not take the oath as ordered because of her belief that it was in violation of the Constitution of the United States.[6]

On or about November 25, 1968, the defendant-appellant Cole personally informed the appellee that she could not continue as an employee at Boston State Hospital unless she subscribed to the employees' loyalty oath contained in Mass. Gen. Laws, ch. 264, § 14. Appellee again refused to subscribe to the oath. The appellant Cole then informed appellee that her employment was terminated and that she would be paid only until November 25, 1968.[7]

Appellee was subsequently paid for her services to November 25, 1968. From January 27, 1969 to May 16, 1969, plaintiff worked at approximately one-third full time without pay at Boston State Hospital on her research project.[8]

On February 2, 1969, the "Occupational Therapist" job category which appellee has previously occupied was filled with another employee by Boston State Hospital, notwithstanding appellee's continued wish to recommence her employment but for the oath required by Mass. Gen. Laws, ch. 264, § 14.[9]

Mrs. Richardson brought the present action in the United States District Court for the District of Massachusetts by

---

[5] App. 64, n.2; Jt. App. 11.
[6] Jt. App. 12.
[7] Jt. App. 12.
[8] Jt. App. 12.
[9] Jt. App. 12, 18.

complaint filed March 21, 1969. The complaint alleged the unconstitutionality of the statute, Mass. Gen. Laws, ch. 264, § 14, prayed for the convocation of a three-judge court pursuant to 28 U.S.C., §§ 2281 and 2284, requested an injunction against the appellants' prohibiting the appellee from continuing her employment and for damages for appellee's uncompensated employment.[10] A three-judge District Court was ordered convened on April 3, 1969, following the submission by appellee of a memorandum of law as to the substantiality of the federal constitutional questions presented in her complaint.[11] A joint Stipulation of Facts was filed by counsel for all parties on May 16, 1969.[12] The three-judge District Court heard oral arguments by counsel for both appellee and appellants on May 29, 1969.

The three-judge District Court, consisting of Aldrich, Ch. J., Julian, D. J., and Garrity, D. J., entered its Judgment and Injunction on June 26, 1969, holding Mass. Gen. Laws, ch. 264, § 14 violative of the First Amendment to the Constitution of the United States and therefore invalid, and permanently enjoining the appellants from prohibiting the appellee from discharging her duties at Boston State Hospital insofar as that prohibition was based upon her refusal to subscribe to the oath required by Mass. Gen. Laws, ch. 264, § 14.[13] The District Court ruled, *inter alia*, that: (1) No question of appellee's standing to sue was raised;[14] (2) The phrase in the first portion of the loyalty oath, "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States and the Constitution of the Commonwealth of Massachusetts" is not itself unconstitutional;[15] (3) The phrase

---

[10] Jt. App. 4-8.
[11] Jt. App. 8.
[12] Jt. App. 10-12.
[13] 300 F. Supp. 1321 at 1323 (D. Mass. 1969); App. 62.
[14] App. 59; Jt. App. 17.
[15] App. 59; Jt. App. 14.

in the second portion of the loyalty oath "oppose the overthrow" was "fatally vague and unspecific" and "hopelessly vague" and therefore unconstitutional;[16] (4) The First Amendment to the United States Constitution forbids the state "from imposing such restrictions upon its employees" as to require them to swear to "oppose the overthrow" of the United States or Massachusetts governments;[17] (5) "Employment cannot be conditioned upon an unintelligible oath;[18] (6) The statute Mass. Gen. Laws ch. 264, § 14, was declared unconstitutional;[19] (7) Appellee's request for back pay was denied.[20]

Defendants-appellants filed a Notice of Appeal from the Judgment of the three-judge court on July 30, 1969. Plaintiff-appellee on August 25, 1969, also filed a Notice of Appeal from that part of the Judgment and Opinion denying her request for back pay. Appellants' Jurisdictional Statement, filed September 29, 1969, with this Court, was docketed as *Cole et al.* v. *Richardson,* No. 679, October Term, 1969. Appellee's Jurisdictional Statement on her cross appeal filed October 24, 1969, with this Court was docketed as *Richardson* v. *Cole et al,* No. 774, October Term, 1969. Appellee further filed a Motion to Affirm or Dismiss in No. 679 with this Court on October 24, 1969, urging alternatively affirmance of the decision of the three-judge District Court or a dismissal of the defendants-appellants' appeal on the ground of mootness since the plaintiff-appellee's job had been discontinued. Defendants-appellants thereupon on November 3, 1969, filed with this Court in No. 774 a Motion to Affirm so much of the decision below as was appealed by plaintiff-appellee. On or about February 11, 1970 defendants-appellants also filed with this Court in

---

[16] App. 59, 61; Jt. App. 14-16.
[17] App. 60; Jt. App. 14-15.
[18] App. 61; Jt. App. 16.
[19] App. 61, 62; Jt. App. 16.
[20] 300 F. Supp. 1321-1323; App. 61.

No. 679 a Memorandum in Opposition to plaintiff-appellee's Motion to Dismiss [or Affirm]. On March 16, 1970, this Court *per curiam* vacated the Judgment of the three-judge District Court and remanded both cases (Nos. 679 and 774) to the United States District Court for the District of Massachusetts "to determine whether these cases have become moot." 397 U.S. 238.

On remand to the District Court, counsel for all parties filed a Supplementary Stipulation of Fact.[21] An affidavit of the Chairman of Civil Liberties Union of Massachusetts was also filed with the Court by plaintiff-appellee setting forth facts relating to continuing objections of various other employees of the Commonwealth of Massachusetts to subscribing to the oath contained in Mass. Gen. Laws, ch. 264, § 14.[22] Following an evidentiary hearing including testimony from the plaintiff Mrs. Richardson and oral argument by counsel, and plaintiff-appellee's retraction of her suggestion of mootness, the three-judge District Court issued its Reinstated Judgment and Injunction on July 1, 1970.[23] The District Court determined that the case was not moot and reinstated its earlier judgment and injunction. The District Court ruled *inter alia* in its "Determination on the Question of Mootness" that: (1) The specific research project for which plaintiff-appellee was hired was still ongoing and defendants-appellants were "ready and willing to employ her on a consulting basis" on an average of two days per week *provided* appellee subscribed to the oath required by Mass. Gen. Laws, ch. 264, § 14;[24] (2) Plaintiff-appellee's claim for damages for breach of her employment contract would not be entertained. This decision, as noted, is unreported.

Appellants thereupon filed a Claim of Appeal from the

---

[21] App. 68; Jt. App. 18-20.
[22] Jt. App. 20-25.
[23] App. 66-67; Jt. App. 29-30.
[24] App. 64; Jt. App. 27.

decision of the three-judge District Court on July 1, 1970. The appellants' Jurisdictional Statement was then timely filed with this Court, as was appellee's Motion to Affirm the District Court decision. This Court noted probable jurisdiction on June 14, 1971.

Summary of Argument

The Massachusetts public employees' loyalty statute and oath struck down by the three-judge Court below infringe, on their face and as applied, the freedoms of belief, speech, association and privacy guaranteed to all citizens by the First and Fourteenth Amendments. The effect of the statute and oath are at least to infringe upon belief and prohibit speech and association in support of the "overthrow" of the government by the proscribed means. The freedom to believe as one wishes is rightly considered the most sacred aspect of the personal freedom protected by the First Amendment and cannot constitutionally be infringed by overbroad governmentally-compelled speech or conduct in conflict with it. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). A statute which fails to recognize and provide for the difference between mere advocacy and criminal speech is unconstitutionally overbroad. *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). See also, *Cohen* v. *California*, 403 U.S. 15 (1971). Likewise, a statute is constitutionally defective in violation of the First Amendment where it draws no distinction between innocent membership in an organization one of whose aims is the "overthrow" of the government and active knowing membership in an organization whose professed goal is the violent overthrow of the government. *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); *Aptheker* v. *Secretary of State*, 378 U.S. 500

(1964); *NAACP* v. *Button*, 371 U.S. 415 (1963). The statute and oath are thus overbroad infringements into the freedoms of expression and association and as such are constitutionally impermissible both because they infringe upon aspects of these freedoms which may not be restricted by government and because this is done without any showing of a compelling subordinating state interest. *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589 (1967); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). The Commonwealth has not and could not show here that Mrs Richardson and thousands of other public employees represent such a threat to the state's security or other compelling interest as to make either necessary or desirable such a broad restriction on their freedom of expression. *United States* v. *Robel*, 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Speiser* v. *Randall*, 357 U.S. 513, 527 (1958); *Cole* v. *Young*, 351 U.S. 536 (1956). And, even if a showing of legitimate and substantial governmental purpose had been made here, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). The Massachusetts oath must fall because it makes no attempt at distinguishing conduct which legitimately may be proscribed from conduct which may not be legitimately proscribed, *Keyishian* v. *Board of Regents*, supra, and on its face would punish all expression in support of the overthrow of the government as a "failure to live up to the oath [which] is a felony". *Richardson* v. *Cole*, 300 F. Supp. 1321, 1322. The oath is a penal statute carrying stiff penalties which is capable of "sweeping and improper application." *NAACP* v. *Button*, 371 U.S. 415 (1963). Moreover, even a "narrowing" construction cannot save such a fatally c broad penal statute which "sweeps indiscriminately across all types of association . . ." [or speech]. *United*

States v. *Robel*, 389 U.S. 258, 262 (1967); *Noto* v. *United States*, 367 U.S. 290 (1961).

Furthermore, the Massachusetts statutory oath infringes another aspect of freedom of expression by compelling Mrs. Richardson and many other public employees on pain of job forfeiture or perjury conviction to speak or act in opposition to the future "overthrow" of the government "by force or violence or other illegal and unconstitutional means." Even if this broad and elusive language contained an ascertainable standard of conduct, such *in futuro* compulsion by means of an oath is an unconstitutional condition on public employment. *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589 (1967); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952). The fact that public employment may be denied altogether will not constitutionally justify unreasonable restrictions upon its grant. *Wieman* v. *Updegraff*, *supra*. Nor may a state, which may not constitutionally compel its citizens generally to speak or act actively in opposition to the overthrow of the government, require this of a public employee without meeting its burden of establishing a compelling state interest. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *NAACP* v. *Button*, 371 U.S. 415 (1963).

The statute and oath also contain — in the words "overthrow", "oppose" and "by any illegal or unconstitutional means" — fatally vague language in violation of the substantive due process guaranteed by the Fourteenth Amendment, as reinforced by the Fifth Amendment's privilege against self-incrimination. See e.g., *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). Such words do not provide an ascertainable standard of conduct and "lack terms susceptible of objective measurement." *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286 (1961). See also, *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). The Commonwealth itself has implicitly acknowl-

edged the shifting and elusive vagaries of this language in the conflicting definitions it has offered at various stages of these proceedings. The danger of such vagueness is even greater in the sphere of the First Amendment. *Baggett* v. *Bullit, supra; Speiser* v. *Randall*, 357 U.S. 513 (1958).

The statute and oath also violate procedural due process as guaranteed by the Fourteenth Amendment in providing for summary discharge for refusal to take the oath without allowing for a public hearing or other clarification procedure. *Connell* v. *Higginbotham*, 403 U.S. 207 (1971). Such a summary discharge with its attendant stain of disloyalty — *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191 (1952) — may occur though the refusal to take the oath may stem from "mistake, inadvertence, or legal advice conscientiously given, whether wisely or unwisely." *Slochower* v. *Board of Education*, 350 U.S. 551, 558 (1956).

The Court below correctly struck down the entire oath and refused thereby to sever clause one from clause two of the oath. The tainted and untainted clauses are too interconnected for this Court to sever them without rewriting the oath.

Argument

POINT I.

ON THEIR FACE AND AS APPLIED, THE MASSACHUSETTS EMPLOYEES' LOYALTY STATUTE AND OATH DECLARED UNCONSTITUTIONAL BY THE COURT BELOW ARE OVERBROAD AND THEREBY VIOLATE THE FREEDOMS OF BELIEF, EXPRESSION, ASSOCIATION AND PRIVACY PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

The requirements of the Massachusetts employees' loyalty oath unconstitutionally invade the freedoms of expression, association, belief and privacy protected by the

First and Fourteenth Amendments to the United States Constitution. The District Court below accepted this argument and expressly found and ruled on two separate occasions "that section 14 of chapter 264 of the General Laws of Massachusetts violates the First Amendment of the Constitution of the United States and is therefore invalid."[1] The District Court further permanently enjoined defendants from prohibiting the plaintiff from discharging her duties (as a research sociologist) at Boston State Hospital insofar as this prohibition is based on plaintiff's refusal to take the loyalty oath required by Mass. Gen. Laws ch. 264, § 14.[2]

The parties have stipulated that plaintiff is "ready, willing and able to recommence her employment at Boston State Hospital but her refusal to take oath required by Mass. Gen. Laws ch. 264, § 14, represents an absolute bar to such employment."[3] Thus, unless the District Court's ruling is sustained by this Court, plaintiff and many other potential employees of the Commonwealth of Massachusetts will be expressly subject to the oath required by Mass. Gen. Laws ch. 264, § 14, as a condition precedent to public employment.[4]

A. *The Requirements of Clause Two of the Massachusetts Loyalty Oath Declared Unconstitutional by the Court Below Are Overbroad and Thereby Unconstitutionally Violate First Amendment Freedoms.*

The requirement imposed by the Massachusetts public employees oath that each affiant swear "that I will oppose

---

[1] Jt. App. 17, 30.
[2] Ibid. 300 F. Supp. 1323.
[3] Jt. App. 12.
[4] See Affidavit of Gerald H. Berlin with attached letter from other state employees refusing to take this oath. Jt. App. 20-25.

the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method" is itself clearly unconstitutional under the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment. The Court below found the language, "'oppose the overthrow' fatally vague and unspecific" because the First Amendment forbids "the state from imposing such restrictions upon its employees."[5] The Court further stated that it regarded as "well settled [the proposition] that employment cannot be conditioned upon an unintelligible oath."[6]

The Massachusetts public employees' loyalty oath under attack here is unconstitutional because of its fatal overbroadness. Statutes are overbroad which proscribe acts which "legitimately may be proscribed" as well as acts "which may not be proscribed."[7] Laws are also fatally overbroad where like section 14, they seek to accomplish constitutionally permissible objections by overbroad means when more restrictive means are available.[8]

The Massachusetts oath is fatally defective under the first portion of the overbreadth doctrine because it proscribes *acts* legitimately punishable by criminal statute while simultaneously invading areas of conscience, belief, speech, privacy and association not properly the province of any government. If the "oppose" clause of the Massachusetts oath is to be meaningfully affirmed and implemented by each state employee, then this requirement will substantially infringe upon the beliefs of every employee who does not necessarily "oppose the overthrow" of

---

[5] 300 F. Supp. at 1322.

[6] Id. at 1323.

[7] *Keyishian* v. *Board of Regents*, 385 U.S. 589, 609 (1967). See e.g., *United States* v. *Robel*, 389 U.S. 258, 267-68 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966).

[8] See e.g., *United States* v. *Robel*, 389 U.S. 258 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

either government by any of the stated means. Such substantial invasion of belief and conscience violates the First Amendment. In addition, the oath punishes all speech in support of the overthrow of the government as a "failure to live up to the oath . . . [which] is a felony,"[9] rather than punishing affirmative unlawful *actions* or at least *advocacy* which constitutes incitement to imminent unlawfulness.[10] The same fatal defect is present in the area of freedom of association. A limiting construction cannot save such statutes:

> It is precisely because the statute sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs foul of the First Amendment.[11]

The domain of *belief* and *conscience* is guaranteed even greater protection than advocacy or association by the First Amendment. The high degree of freedom accorded belief under our system developed first in the area of the religious freedom but was subsequently extended to the realms of speech and belief. From *Cantwell* v. *Connecticut*[12] onward, the Court has left no doubt that the First Amendment protects both conduct and belief. "Thus the Amendment embraces two concepts, freedom and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[13] As Mr. Justice Douglas said in concurrence, in *Speiser* v. *Randall*,[14] the domains of conscience and belief have been set aside and protected from govern-

---

[9] 300 F. Supp. 1321, 1322.
[10] *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).
[11] *United States* v. *Robel*, 389 U.S. 258, 262 (1967).
[12] 310 U.S. 296 (1940).
[13] Id. at 303-04.
[14] 357 U.S. 513, 529 (1958).

mental intrusion ... What a man thinks is of no concern to government."[15] This Court has also said: "The First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas* v. *Collins*.[16] The Massachusetts oath invades this sanctuary needlessly.

The Court below noted that the verb "oppose" runs a gamut of common meanings "from the negative, 'not favor' or 'refrain from,' to the affirmative, viz., to take active steps to restrain the conduct of others."[17] Further commonly accepted definitions of "oppose" range from "to confront with hard or searching question," to "to put in opposition with a view to counterbalance or countervail, to set against, whether by way of contrast or of resistance."[18]

The word "overthrow" itself also suffers from similar defects. The most commonly accepted meaning is the "*act* of overthrowing or state of being overthrown."[19] [emphasis added]. The possible distinction suggested by the Court below between "overthrow" and "attempt to overthrow" is thus highly illusory.[20]

---

[15] Id. at 536. See also *Brandenburg* v. *Ohio*, 395 U.S. 444, 456-57 (1969), (Douglas J., concurring); *Schneider* v. *Smith*, 390 U.S. 17, 25 (1968); *Torcaso* v. *Watkins*, 367 U.S. 488, 495-96 (1961); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 266 (1957) (Frankfurter, J., concurring); *United States* v. *Rumely*, 345 U.S. 41 (1953). In *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 634 (1943), this Court refused to sustain a state compulsory flag salute statute against the conscientious refusal of Jehovahs' Witness school children. To sustain the compulsory salute, said Mr. Justice Jackson for the Court,

> we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

See also, *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969), "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

[16] *Thomas* v. *Collins*, 323 U.S. 516 (1945).

[17] 300 F. Supp. at 1322.

[18] Id. See Webster's New International Dictionary, 2d ed., ("oppose")

[19] Id. ("overthrow")

[20] 300 F. Supp. at 1322.

The kind and nature of the actions and/or speech that might be required by a public employee sworn to "oppose the overthrow" of the Massachusetts or federal government were summarized cogently by the Court below from the Commonwealth's own arguments before the Court.

> '[I]n the event that a clear and present danger arose of the actual overthrow of the government, * * * the public employee [would] be required to use reasonable means at his disposal to attempt to thwart that effort. What he might do in such circumstances could range from the use of physical force to speaking out against the downfall of the government. The kind of response required would be commensurate with the circumstances and with the employee's ability, his training, and the means available to him at the time.'

In oral argument, the Deputy Assistant Attorney General amplified the Commonwealth's position. There were, he asserted, three standards of obligation to take active steps to "oppose" the overthrow of the government by force or violence. The ordinary citizen who has taken no oath has an obligation to act in *extremis;* a person who has taken the first part of the present oath would have a somewhat larger obligation, and one who has taken the second part has one still larger.[21]

This range of possible reactions which the Massachusetts oath would require from public employees is totally inconsistent with the free and untramelled exercise of the rights of belief, speech, association and privacy otherwise available to each and every citizen of Massachusetts. There

[21] Ibid.

are at least three significant restrictions on *belief* and *speech* imposed by the section 14 oath: (1) the oath taker, as a precondition to obtaining public employment by the Commonwealth of Massachusetts "or any political subdivision thereof" is required to say what she does not believe nor want (and but for her interest in a state job, would not have) to say; thereafter, as a public employee, she may at any time have; (2) to speak in opposition to "overthrow" of the state or federal government when she would wish to keep silent and/or (3) to keep silent when she would wish to speak. Furthermore, the oath taker's statutory compulsion to speak or act in opposition to "overthrow" may well be totally inconsistent with her membership in groups or her association with individual advocating or believing in the "overthrow" of either government. Yet, such membership or association, for any private citizen of the Commonwealth, would unquestionably be protected by the First Amendment as construed in many decisions of this Court.

It is clear that speaking in favor of the overthrow of either government, *mere advocacy* — *Brandenburg* v. *Ohio*,[32] *Noto* v. *United States*[33] — could be punishable under section 14 although not otherwise criminally culpable.[34] For example, if plaintiff were required to take the Massachusetts oath and, thereafter, demonstrators were to sit in at the office of the Governor or on the State Capital lawn to support their demands for his resignation and the installation of a more "democratic" government, plaintiff would be within her constitutinal rights as a citizen to support this demonstration with a speech on Boston com-

---

[32] 395 U.S. 444, 448 (1969).

[33] 367 U.S. 290, 297-98 (1961).

[34] See also *Cohen* v. *California*, 403 U.S. 15 (1971); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940); Cf. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Adderly* v. *Florida*, 385 U.S. 39 (1966).

mon; yet she would clearly be liable to prosecution under section 14 if the oath were sustained. As Mr. Justice Harlan has rightly said in the context of another free speech decision, "... we cannot indulge the facile presumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[25]

Likewise, mere innocent membership in an organization, one of whose purposes was the overthrow of either government,[26] could be punishable as a violation of section 14. Yet this Court has unequivocally stated that "[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is [no more] a constitutionally adequate basis for exclusion from such positions as those held by appellants,"[27] than it is justification for criminal punishment,[28] or a basis for a finding of moral unfitness justifying disbarment of an attorney.[29]

Yet like the New York provision discussed in *Keyishian* v. *Board of Regents*,[30] the Massachusetts oath blankets all employees regardless of the security-sensitivity of their positions.[31] In Mrs. Richardson's case, in fact, there is not and there can be no demonstration by the state that her functions as research sociologist involved *any* security-sensitive considerations. Hence, the function of the Massachusetts oath is *not* "to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public," but rather "to penalize

---

[25] *Cohen* v. *California*, 403 U.S. 15, 26 (1971).

[26] *Elfbrandt* v. *Russell*, 384 U.S. 11, 17 (1966); *Wieman* v. *Updegraff*, 344 U.S. 183, 190 (1952).

[27] *Keyishian* v. *Board of Regents*, 385 U.S. 589, 606 (1967).

[28] *Scales* v. *United States*, 367 U.S. 203 (1961); *Yates* v. *United States*, 354 U.S. 298 (1957).

[29] *Schware* v. *Board of Examiners*, 353 U.S. 232 (1957).

[30] 385 U.S. 589, 607 (1967).

[31] *Speiser* v. *Randall*, 357 U.S. 513, 527 (1958); *United States* v. *Robel*, 389 U.S. 258, 266 (1967); *Cole* v. *Young*, 351 U.S. 536, 546 (1956).

political beliefs." *Speiser* v. *Randall*.[33] Cf. *Garner* v. *Board of Public Works*.[33] The oaths approved in *Garner* and earlier cases did not "attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern."[34]

While this Court has now held that a "minimal" loyalty oath of general support like that contained in clause one of the Massachusetts oath may be required as a precondition to public employment,[35] an oath cutting as broadly as clause two of the Massachusetts oath into crucial First Amendment freedoms can only be justified by a compelling and overwhelming state interest.[36] *And*, even where the government has met the burden of showing this compelling interest, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be *more* narrowly achieved."[37] For "[p]recision of regulation must be the touchstone in an area so closely touching our precious freedoms,"[38] lest the oath-taker be wrongfully brought to "steer far wider of the unlawful zone"[39] than other citizens. In fine, the powers of government must be so exercised in attaining a permissible end as never unduly to infringe upon, inhibit or chill the exercise of the freedoms guaranteed by the Constitution.[40]

---

[33] 357 U.S. 513, 527 (1958).

[33] 341 U.S. 716, 725 (1951). *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961); *American Comm. Ass'n.* v. *Douds*, 339 U.S. 382 (1950).

[34] *Speiser* v. *Randall*, 357 U.S. 513, 527 (1958).

[35] *Knight* v. *Board of Regents*, 269 F. Supp. 339 (Southern District New York 1967, aff'd per curiam 390 U.S. 36); *Connell* v. *Higginbotham*, 403 U.S. 207.

[36] *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

[37] *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

[38] *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

[39] *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958).

[40] *In re Stolar*, 401 U.S. 23, 30 (1971); *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 573 (1968); *NAACP* v. *Button*, 371 U.S. 415, 434 (1963); *Speiser* v. *Randall*, 357 U.S. 513, 529 (1958); *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960).

Where government would trench upon rights within the penumbra of the First Amendment, the least drastic means available must be used to attain the permissible end.[41] Of course the requirement of the second half of the overbreadth doctrine that the oath or regulation "be narrowly drawn to prevent the supposed evil,"[42] does not even come into play until and unless the State meets its heavy initial burden of showing a compelling interest in requiring this form of oath at all.[43] No such showing has been made here.

For the Massachusetts statute both as written and as applied to plaintiff does not involve situations where the state by its officers has conducted an orderly inquiry, seeking relevant information concerning moral character or employment qualifications.[44] Nor was the present plaintiff asked to swear to or disclaim the truthfulness of specific data or facts bearing on her fitness as a sociologist or as a researcher. In fact, the Commonwealth has conceded plaintiff's fitness and qualifications to perform the research work for which she was hired, by its stipulation that plaintiff was terminated solely for her refusal to sign the oath and that plaintiff would be rehired if she took the oath.[45] Plaintiff was asked to swear to an oath, whose violation is punishable as a felony, which would be conclusive and binding on her future belief, speech, and association. Plaintiff's case is easily distinguishable, therefore, from the line of cases sustaining a legitimate inquiry by the state into the

---

[41] *United States* v. *Robel*, 389 U.S. 258, 262 (1967); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-87 (1965); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 513-14 (1964); *Baggett* v. *Bullitt*, 377 U.S. 360, 378-79 (1964); *NAACP* v. *Button*, 371 U.S. 415, 423-33, 438 (1963).

[42] *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1939).

[43] *Baird* v. *Arizona*, 401 U.S. 1, 7 (1971).

[44] *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg* v. *California*, 366 U.S. 36 (1961).

[45] Jt. App. 12, 18.

fitness of a public employee or of an applicant for a license or certification.[46]

Nor is it a satisfactory answer where a statute cuts as sweepingly as does the Massachusetts oath into rights of speech and association to argue that a limiting construction should be found to "save" the statute.[47] Here, the Court below, as this Court in *Baggett* v. *Bullitt*,[48] could not even find such a satisfactory narrowing construction, at least not without rewriting the statute. But this Court has properly refused to do such rewriting in the past, leaving this task instead for the legislature.

The proposition advanced and then rejected by the Court below that the term "oppose the overthrow" is a mere mirror image of the word "support" is "speculation, not certainty."[49] Furthermore, this proposition is consistent neither with the common meanings of both phrases nor with the Commonwealth's own interpretations as discussed in the first opinion of the District Court below.[50] As this Court noted in *Aptheker* v. *Secretary of State*,[51]

> To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

---

[46] E.g., *Konigsberg* v. *California*, 366 U.S. 36 (1961); *Lerner* v. *Casey*, 357 U.S. 468 (1958).

[47] It should be remembered this Court has consistently stated there is no requirement that the person attacking the constitutionality of a statute demonstrate that his own conduct could not be regulated by a statute drawn with the required specificity and precision. *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965); citing *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940); *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963).

[48] 377 U.S. 360 (1964).

[49] *Whitehill* v. *Elkins*, 389 U.S. 54, 61 (1967).

[50] 300 F. Supp. 1321.

[51] 378 U.S. 500, 515 (1964).

Mr. Chief Justice Warren phrased the matter in similar fashion when he wrote for the majority in *United States* v. *Robel*:[52]

> We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress.

Furthermore, the very real danger exists that "[s]o longer as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."[53] The threat of sanctions is frequently as effective in deterring constitutionally protected conduct as their actual exercise.[54] If the threat of dismissal for speaking out is inhibiting to a public school teacher,[55] how much more so is the prospect of prosecution under two separate felony statutes to a Massachusetts public employee?[56]

The very prospect of stigmatization resulting from failure to take the oath is itself a deterrent to the exercise of First Amendment freedoms.

---

[52] 389 U.S. 258, 267 (1967).

[53] *Dombrowski* v. *Pfister*, 380 U.S. 479, 494 (1965). See also *Baggett* v. *Bullitt*, 377 U.S. 360, 368-69, n.7, 373-74 (1964); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286-87 (1961).

[54] *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963).

[55] *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968).

[56] This Court noted in an analogous context that the choice of job forfeiture or self-incrimination is the "antithesis of the free choice to speak out or remain silent." *Garrity* v. *New Jersey*, 385 U.S. 493, 496-498 (1967).

> There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy".[87]

And as Mr. Justice Brennan observed somewhat later, "[w]hether or not loss of public employment constitutes 'punishment,' cf. *United States* v. *Lovett*, 328 U.S. 303, there can be no doubt that the repressive impact of the threat of discharge will be no less direct or substantial."[88] There is no ambiguity in the present case: plaintiff was terminated as a public employee of the Commonwealth of Massachusetts for failure to subscribe to a "loyalty" oath. Cf. *Law Students' Research Council* v. *Wadmond*,[89] where this court found that no applicant had ever been denied admission to the New York bar for failure to answer questions based upon the offensive statutes. This termination is a stain which Mrs. Richardson will always carry unless this Court upholds the decision below.

Plaintiff has suggested above that the second element of the overbreadth doctrine need not even be reached here because the Commonwealth has not sustained its burden of showing a compelling state interest in so substantial an intrusion into rights protected by the First Amendment. This Court has repeatedly affirmed the principle that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."[90] Mrs. Richardson's position is no more security-sensitive than that of the thousands of public school teachers in Massachusetts who

---

[87] *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191 (1952).
[88] *Keyishian* v. *Board of Regents*, 385 U.S. 589, 607 fn. 11 (1967).
[89] 401 U.S. 154, 158, 166 (1971).
[90] *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

are also required to affirm the oath as a condition of employment.

Furthermore, Massachusetts presently has in force a penal statute which does attempt to deal directly with the advocacy, incitement or counselling of acts of assault or homicide on a public official or the overthrow by force or violence of the State or Federal Government, Mass. Gen. Laws ch. 264, §11:

> Whoever by speech or by exhibition, distribution or promulgation of any written or printed document, paper or pictorial representation advocates, advises, counsels or incites assault upon any public official, or the killing of any person, or the unlawful destruction of real or personnal property, or the overthrow by force or violence or other unlawful means of the government of the commonwealth or of the United States, shall be punished by imprisonment in the state prison for not more than three years, or in jail for not more than two and one half years, or by a fine of not more than one thousand dollars; provided, that this section shall not be construed as reducing the penalty now imposed for the violation of any law. It shall be unlawful for any person who shall have been convicted of a violation of this section, whether or not any sentence shall have been imposed, to perform the duties of a teacher or of an officer of administration in any public or private educational institution, and the superior court, in a suit by the commonwealth, shall have jurisdiction in equity to restrain and enjoin any such person from performing such duties thereafter; provided, that any such restraining order or injunction shall be forthwith vacated if such conviction shall be set aside.

Whatever constitutional validity has been left to such statutes by the decisions of this court construing the Smith Act[21] and state anarchy and sedition statutes,[22] at least

[21] See e.g., *Dennis* v. *United States*, 341 U.S. 494 (1951), uphold-

these enactments avoid the invidious discrimination of the employment oaths and seek instead only to punish those acts of the accused—whether public employee or private citizen—which seek to accomplish the proscribed deed through unlawful force or violence or through speech which urges other to do so. The emphasis is more properly then on the accused's own past and ascertainable acts, not on his *beliefs* or on his assessment of the acts of others.

The Commonwealth, in its brief to this Court, does not even pretend to offer a compelling state interest to support the requirement of the employees' oath as a condition to all public employment. Instead, the Commonwealth suggests in an ingenious argument that since it perceives no First Amendment rights which are infringed by the oath, it need offer no satisfactory rationale for the state's interest in compelling the oath. This argument falls of its own weight. "[A]n affirmation of one's recognition and respect for the law"—to use the Attorney General's own words[23]—is scarcely the type of interest which can or should be vindicated and nurtured by governmental compulsion. "[A]ffirmation and respect for the law" must spring from the conscience and belief of each citizen whether public employee or not. Such respect ultimately can only be nourished and cultivated by a government that encourages the sanctity of belief and speech, not created by coercion imposed from above. To the extent that Massachusetts has some substantial interest in compelling certain public employees to swear as a condition of employment to do more than support the government of the Commonwealth and of the United States, this interest can be effectively served by a narrower and less intrusive statute.

---

ing the Smith Act, 341 U.S.C. §2385 et seq., as modified by *Yates* v. *United States*, 354 U.S. 298 (1957) and *Scales* v. *United States*, 367 U.S. 203 (1961).

[22] Such state statutes are of course subject to the Federal Preemption Doctrine of *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956), as limited by *Uphaus* v. *Wyman*, 360 U.S. 72 (1959), and as construed by the Massachusetts Supreme Judicial Court in *Commonwealth* v. *Gilbert*, 334 Mass. 71 (1956).

[23] Appellants' Brief, p. 7.

B. *The Future Speech and Conduct Compelled of Public Employees by the Massachusetts Loyalty Oath Unconstitutionally Violates Freedoms Protected by the First Amendment*

Neither Massachusetts nor any other state may infringe its citizens' beliefs by compelling them in a penal statute to speak or act actively in support of their government. But the oath required by Massachusetts General Laws ch. 264, § 14, requires exactly this. A public employee as a condition of employment must presently affirm her willingness to oppose by words or deeds at some indefinite future time any efforts by others to overthrow the state or federal government. No decision of this Court has been found sustaining the authority of a state to compel a citizen through such a penal statute to bind herself to future obligations of this nature or be denied employment. Concededly, states may and do constitutionally enact and enforce statutes which punish those who take part in or attempt the violent overthrow of the state or local government. States may also require basic and minimal expressions of loyalty from their public employees. *Knight* v. *Board of Regents*.[24] But state compulsion of actual future opposition by its citizenry to such overthrow or attempts at overthrow is not consistent with the scope of the First Amendment. No decision sustaining such broad and significant compulsion *in futuro*, much less at the cost of sacrificing any opportunity for public employment, can be found.

The Massachusetts oath is unconstitutionally overbroad precisely because it requires "under the pains and penalties of perjury" this sworn form of higher loyalty from all

---

[24] *Knight* v. *Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), aff'd per curiam 390 U.S. 36 (1968); *Connell* v. *Higginbotham*, 403 U.S. 207 (1971).

its public employees which it does not and could not require of its citizenry generally. This Court has properly struck down less burdensome conditions on public employment in other decisions.

> But it does not at all follow that because the Constitution does not guarantee a right to public employment, a city or a State may resort to any scheme for keeping people out of such employment . . . . To describe public employment as a privilege does not meet the problem.[28]

Arguably, a state militiaman or executive officer as part of his daily duties has an obligation to oppose by deeds and words the violent overthrow of his government, but there is no suggestion by the Commonwealth that this oath is needed to reach that special situation alone. One must strain to see the importance to the Commonwealth of requiring of most public employees *active* opposition to "overthrow". Unless there is something inherent in the duties of a state employee, which requires her as an integral part of her job or because of her position to swear actively to oppose the government's overthrow, the state cannot force that employee to act or speak where the citizenry generally is not required to do so. There has been no such showing by Massachusetts here. The statute and oath therefore are unconstitutional as they *indiscriminately* require all Massachusetts public employees to oppose the overthrow of the government. This indiscriminate and unjustified compulsion represents a significant unwarranted governmental intrusion into freedom of belief. In *Connell* v. *Higginbotham*,[29] Mr. Justice Marsh-

---

[28] *Garner* v. *Board of Public Works*, 341 U.S. 716, 725 (1951), (Frankfurter, J., concurring in part and dissenting in part). See e.g., *Talley* v. *California*, 362 U.S. 60 (1960); *Bates* v. *Little Rock*, 361 U.S. 516, 525, 527 (1960); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *NAACP* v. *Alabama*, 357 U.S. 449, (1958); *Lovell* v. *Griffin*, 303 U.S. 444 (1938).

[29] 403 U.S. 207 (1971).

all in concurrence found unconstitutional that part of the Florida oath requiring teachers to swear " 'that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence.' " Justice Marshall stated:

> Due process may rightly be invoked to condemn Florida's mechanistic approach to the question of proof. But in my view it simply does not matter what kind of evidence a State can muster to show that a job applicant "believe[s] in the overthrow." For state action injurious to an individual cannot be justified on account of the nature of the individual's beliefs, whether he "believe[s] in the overthrow" or has any other sort of belief. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943).
>
> *I would strike down Florida's 'overthrow' oath plainly and simply on the ground that belief as such cannot be the predicate of governmental action.*[27] (emphasis added)

In *Barnette*[28] this Court held that West Virginia could not require its public school pupils to pledge allegiance to the United States flag on penalty either of the students' expulsion or criminal prosecution of their parents. In *Barnette*, as here, the state required a present *affirmative act* in order to comply with the state statutes. Justice Jackson replied for this Court:

> It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an atti-

---

[27] 403 U.S. 207, 209 (1971).
[28] 319 U.S. 624 (1943).

tude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It *would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.*

. . . .[V]alidity of the asserted power to force an American citizen *publicly* to *profess* any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.[vi] (emphasis added).

Surely in this instance Massachusetts is requiring *at the very least* just such a public affirmation of belief — however inconsistent with the conscience of the oath-taker — as a precondition to public employment. Yet the *Barnette* Court flatly stated that the state could not force citizens to confess by word or act their faith in "what shall be orthodox in politics, nationalism, religion or other matters of opinion . . . . If there are any circumstances which permit an exception, they do not now occur to us."[vii] For "[f]reedom to think is inevitably abridged when beliefs are penalized by imposition of civil disabilities."[viii]

[vi] Id. at 319 U.S. 624, 633-34.

[vii] Id. at 642.

[viii] *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 446 (1950), (Black, J., dissenting opinion).

The *Barnette* Court squarely rejected West Virginia's argument that the power to impose such an obligation found its source in "the strength of government to maintain itself" [72] and to compel unity. Such a requirement is hostile to the nature of our government.

> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings [coerced unity] There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.[73]

Clearly, then, this Court would reject any attempt by Massachusetts to compel and exact such an oath from its citizenry as a whole as an unconstitutional abridgement of conscience and belief. Where, then, does Massachusetts derive the authority to compel the statutory higher degree of "loyalty" from its public employees? The oath can scarcely be said to offer a "measure of self protection against anticipated overt acts of violence."[74] Even though the state undoubtedly has some interest in requiring a form of greater professed loyalty from its employees in security-sensitive positions, Massachusetts has naturally enough made no effort to show that a research sociologist like the plaintiff occupies such a position. This is true of most other

---

[72] 319 U.S. 624, 636 (1943).

[73] Id. at 641.

[74] *Wieman* v. *Updegraff*, 344 U.S. 183, 195 (1952), (Frankfurter, J., concurring opinion).

state employees as well.[75] In fact, it is to be doubted whether Massachusetts or any other state could compel by oath the kind of action or speech required by § 14 of ch. 264 of even security-sensitive employees.

Furthermore, even if it be conceded *arguendo* that such action or speech could be compelled of public employees, the means employed here bear little relationship to the legitimate state interest in the greater actual loyalty of its public employees in security-sensitive position. *Pickering* v. *Board of Education*[76] presents an analogous context. There a public school teacher was dismissed for sending a letter to a local newspaper critical of the board of education. The local School Board determined that the publication of the letter was "detrimental to the efficient operation and administration of the schools"[77] and dismissed Pickering. In finding the dismissal a violation of Pickering's First Amendment rights, this Court stated:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues that are currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way *either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.* In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

---

[75] See e.g., *Kepishian* v. *Board of Regents*, 385 U.S. 589 (1967). Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961).

[76] 391 U.S. 563 (1968).

[77] Id. at 564.

> . . . [I]n a case such as the present one, in which the *fact of employment* is only *tangentially* and *insubstantially* involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.[18] [emphasis added]

As in *Pickering*, so here it cannot seriously be maintained that the failure of most Massachusetts public employees actively to oppose "the overthrow" by speech or deed of either the State or Federal Government would have a substantial enough effect on the survival of the Commonwealth to justify sanctioning the compulsion inherent in Mass. Gen. Laws ch. 264, § 14. Lack of coerced opposition to "overthrow" will neither impede the orderly operation of government nor result in danger to the government. Nor will the failure to swear to "oppose the overthrow" interfere significantly with the "daily duties" of most public employees. Lack of opposition to attempted violent overthrow might be harmful in extremis because such opposition could help to forestall the overthrow. But this opposition relates not at all to the fact of government employment or to qualifications of the employee. There is thus an insufficient nexus between the interest of Massachusetts in adequately protecting itself and the broad requirement of section 14, enforceable by dismissal and criminal penalties, that all employees oppose the overthrow of that government.

What significant detriment is there to the State if it is restrained from compelling all of its public employees to pledge to "oppose the overthrow" of that government? Yet

---

[18] 391 U.S. 563, 572-573, 574 (1968).

the gain to the State's citizen-employees is obvious. For as this Court has noted in striking down another employees' loyalty oath, "it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive." *Cramp* v. *Board of Public Instruction*.[78]

On the basis of *Pickering* and the other decisions of this Court cited above, plaintiff asserts that the duty of a public employee to oppose affirmatively the violent overthrow of the government might arise only where (1) the employee's failure to do so would substantially undermine the quality of his job performance, e.g., state police or militia; or (2) where the employee's failure to do so would substantially affect the existence of the government generally because of his prominence. This latter qualification would apply to a limited number of public officials whose failure to oppose the violent overthrow of the government would, because of their high public visibility and standing, be said to contribute actively to the overthrow of the government. Even in both these instances, however, there are certainly good and sufficient alternative sanctions available to effectuate the state's legitimate interest without the use of "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*.[79] The Massachusetts employee loyalty oath is unconstitutional because its broad reach brings it squarely within the constitutional limitations imposed by the First Amendment.

---

[78] 368 U.S. 278, 286 (1961).

[79] 364 U.S. 479, 488 (1960). See Mass. Gen. Laws, Ch. 264, §11, App., *infra*.

POINT II

On Their Face and as Applied, the Massachusetts Statute and Loyalty Oath Declared Unconstitutional by the Court Below Violate the Due Process Clause of the Fourteenth Amendment.

A. *The Language of the Second Clause of the Massachusetts Employees Loyalty Oath Required as a Condition of Pubilc Employment Is Unconstitutionally Vague, Uncertain and Broad in Violation of Due Process of Law.*

No principles of due process are more firmly established in our law than that a statute lacking "terms susceptible of objective measurement,"[1] or "forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ."[2] denies the due process of law guaranteed by the Fourteenth Amendment to the U. S. Constitution. The District Court below properly found the second clause of the Massachusetts employee's loyalty oath to be "fatally vague and unspecific."[3] This Court should sustain that determination.

The second clause contains at least three vague and uncertain words or phrases. These words or phrases are "oppose", "overthrow", and, in this context, "by any illegal or unconstitutional method." The lengthy definitional gamut which both "oppose" and "overthrow" may run here were discussed at length above.

No definition or standards are to be found either in the oath or in the general statutory context. No "gloss" has

---

[1] *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961).
[2] *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).
[3] 300 F. Supp. 1391 at 1392.

been placed on any of these words by the Massachusetts Court.[4] If plaintiff had taken the oath, and were able to discern in some mysterious way that an impermissible "overthrow" of the state or federal government was taking place, would her duty simply be defined as intellectual opposition or would she have to speak out against the "overthrow," or even resist with arms? Plaintiff would not know nor could any other public employee.

Similarly, what is an "overthrow", especially one accomplished by an "illegal or unconstitutional method"? The District Court rightly noted that "[o]bviously, if we are speaking in terms of making active opposition to someone else's conduct, it is too late to oppose after there has been an overthrow—the opposition must be to the attempt."[5] Yet the statute uses the word "overthrow" and "overthrow" alone.

Presumably the words "illegal" or "unconstitutional" are not necessarily synonymous with "force" or "violence" since they follow those words in the same sentence. Would a peaceful "sit-in" by militants in the office of a state official, which was subsequently found to be a criminal trespass, constitute an "illegal" overthrow or an attempt at such an overthrow? Would such a sit-in be an overthrow or attempted overthrow if the state official found it impossible to continue his duties during its continuance? And does the sit-in, subsequently adjudicated on appeal as "illegal", constitute a "method" of overthrow? Would a fiery speech on the state capital lawn urging the overthrow of the government be a "method" of overthrow? What if the rally were undertaken with a permit? The vagueness problems are obvious and well illustrate the impossible position in which the conscientious oath-taker is placed.

---

[4] Cf. *Gerende* v. *Election Bd.*, 341 U.S. 56 (1951).

[5] 300 F. Supp. 1321, 1322.

The vagueness of this language is also well demonstrated by the shifting definitions given it by the Commonwealth in this litigation. In his first brief in the District Court below, the Attorney General argued:

> Only in the event that a clear and present danger arose of the actual overthrow of the government, would the public employee be required to use reasonable means at his disposal to attempt to thwart that effort. What he might do in such circumstances could range from the use of physical force to speaking out against the downfall of the government. The kind of response required would be commensurate with the circumstances and with the employee's ability, his training, and the means available to him at the time.[6]

Later, the Attorney General's office, in oral argument before the District Court

> asserted, three standards of obligation to take active steps to "oppose" the overthrow of the government by force or violence. The ordinary citizen who has taken no oath has an obligation to act *in extremis*; a person who has taken the first part of the present oath would have a somewhat larger obligation and one who has taken the second part has one still larger.[7]

Thereafter, in its first Jurisdictional Statement to this Court, on the Commonwealth's appeal in No. 679, *Cole* v. *Richardson*, the Attorney General argued:

> [I]t is submitted that the second portion of the oath, by the most reasonable interpretation, requires no more of the oath-taker than not favoring the over-

[6] Brief for the Defendant at 11.
[7] 300 F. Supp. 1321, 1322.

> throw of the government. . . .[But][e]ven if the Massachusetts oath . . . could possibly be read to impose an affirmative obligation to speak or act, such an obligation would of course be read as applying only in the most limited and extreme of circumstances—when the downfall [sic] of the Constitution or the destruction of the government is imminent, when there is a clear and present danger of the foundations and institutions of democracy being overthrown.[8]

Still later, in his second and most recent Jurisdictional Statement, while stressing that "[i]f there is any ambiguity in the Massachusetts oath, it is certainly not so severe as to seriously jeopardize the ability of a state employee to conform his conduct to the requirements of the oath . . . .",[9] the Attorney General has also stated that "the Massachusetts oath requires *no affirmative conduct* unless and until there is a clear and present danger to the existence of the nation and/or the state."[10] [Emphasis added]. Finally, in his brief to this Court, while restating the "clear and present danger" argument quoted immediately above, the Attorney General has suggested yet another interpretation of these vague, elusive and evanescent words: "All that the oath in the instant case requires is an affirmation of one's recognition and respect for the law."[11] More eloquent testimony to the impossibility of satisfactorily and constitutionally defining the language of clause two could hardly be found than in these forthright but shifting definitions offered by the Commonwealth.

This Court has stated repeatedly in construing state employee loyalty oaths that the "oath required must not

---

[8] Appellants' First Jurisdictional Statement at 10.
[9] Appellants' Second Jurisdictional Statement at 9.
[10] Id. at 10.
[11] Appellants' Brief at 7, 10.

be so vague and broad as to make men of common intelligence speculate at their peril on its meaning."[12] Yet as the Court below observed about the Massachusetts oath, "[t]he very fact that such varied standards, as well as the alternative one of purely negative behavior earlier adverted to, can be suggested is enough to condemn the language as hopelessly vague. It is, of course, well settled that employment cannot be conditioned upon an unintelligible oath. *Cf. Conolly* v. *General Constr. Co.*, 1926, 269 U.S. 385, 391 . . . ; *Cramp* v. *Board of Public Instruction of Orange County*, 1961, 368 U.S. 278, 287 . . . ."[13]

In *Whitehill* v. *Elkins*, University of Maryland faculty members were required under the pains and penalties of perjury to swear that they were "not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence."[14] This Court held that oath unconstitutionally vague in violation of the Fourteenth Amendment. Justice Douglas, for the Court, cogently defined the fatal vice of vagueness which is as real for the plaintiff here as it was for the Maryland teachers:

> Would a member of a group that was out to overthrow the government by force or violence be engaged in that attempt "in one way or another" within the meaning of the oath, even though he was ignorant of the real aims of the group and wholly innocent of any illicit purpose? We do not know; nor could a prospective employee know, save as he risked a prosecution for perjury . . . .
>
> . . . The lines between permissible and impermissible

[12] *Whitehill* v. *Elkins*, 389 U.S. 54, 58-59 (1967).
[13] 300 F. Supp. 1321, 1323.
[14] 389 U.S. 54, 55 (1967).

conduct are quite indistinct. Precision and clarity are not present. Rather we find an overbreadth that makes possible oppressive or capricious application as regimes change. That very threat, as we said in another context (*NAACP* v. *Button*, 371 U.S. 415, 432-433), may deter the flowering of academic freedom as much as successive suits for perjury.[25]

If the Maryland oath struck down in *Whitehill* was vague, the Massachusetts oath at issue here is vaguer still. The Maryland oath-takers could at least be said to have some knowledge of their own intention to act to overthrow the government. Here, the affiant is required to make an impossible calculation and act accordingly: she is compelled to assess the nature and quality of others' actions and then to "oppose" those actions should she deem them impermissible under the statute. Thus where there was but one constitutional obscurity in the Maryland oath, there are two or three here.

In like fashion this Court has struck down as unconstitutionally vague numerous anti-subversive oaths in recent years. The constitutional infirmity in the Massachusetts oath is hardly resolved by arguing, as has the Commonwealth in its Brief, that the oaths involved in many of the earlier cases are distinguishable because the oaths involved "were so-called negative or non-Communist oaths."[26] Where an oath is fatally vague the risks to the affiant do not depend on whether the oath requires an affirmation on the one hand or a disclaimer on the other.

So, for example, in *Cramp* v. *Board of Public Instruction*,[27] a Florida public employees' oath that the affiant had, inter alia, never lent "aid, support, advice, counsel or influence to the Communist Party" was unanimously struck down on grounds of unconstitutional vagueness by the Court. This Court observed:

---

[25] Id. at 59, 61-62.
[26] Appellants' Brief at 7.
[27] 368 U.S. 278 (1964).

> The vices inherent in an unconstitutionally vague statute—the risk of unfair prosecution and the potential deterrence of constitutionally protected conduct — have been repeatedly pointed out in our decisions . . . . [citations omitted] . . . . These are dangers to which all who are compelled to execute an unconstitutionally vague and indefinite oath may be exposed . . . .[18]

In *Baggett* v. *Bullitt*,[19] oaths requiring (1) the oath that faculty members would "by precept and example promote respect" for the flag; and (2) a disclaimer of being a "subversive person", were similarly held void for vagueness by this Court.

> The susceptibility of the statutory language to require foreswearing of an undefined variety of "guiltless knowing behavior" is what the Court condemned in *Cramp*.[20]

Similarly, in *Keyishian* v. *Board of Regents*,[21] the New York State Feinberg anti-subversive law and a related statute requiring public employee loyalty oaths mere held void for vagueness on due process grounds. The Court there observed in part:

> . . . The crucial consideration is that no teacher can know just where the line is drawn between "seditious" and nonseditious utterances and acts. . . .
>
> • • • •
>
> . . . It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and

---

[18] Id. at 283-84.
[19] 377 U.S. 360 (1964).
[20] Id. at 368.
[21] 385 U.S. 589 (1967).

acts proscribed increases that caution in "those who believe the written law means what it says." *Baggett* v. *Bullitt, supra,* at 374.[23]

This Court has constantly reemphasized that overly vague language in oaths or anti-subversive statute is especially suspect where it trenches on the area of First Amendment rights. In *Cramp* v. *Board of Public Instruction,*[24] where this Court unanimously struck down the Florida oath, it was said:

> The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of freedoms affirmatively protected by the Constitution. As we said in *Smith* v. *California,* ". . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."[25]

The reasoning in the speech or association—related vagueness cases is that the employee-affiant, not knowing the precise limits of the oath's prohibition, or as here, required affirmation, "necessarily must steer far wider of the lawful zone", *Speiser* v. *Randell,*[26] than is consonant with the active exercise of her First Amendment rights.[27]

---

[23] Id. at 599, 601.
[24] 368 U.S. 278, 287 (1964).
[25] Id. at 287.
[26] 357 U.S. 513, 526 (1958).
[27] See also *Keyishian* v. *Board of Regents,* 385 U.S. 589, 599, 601 (1967); *Baggett* v. *Bullitt,* 377 U.S. 360, 374 (1964); *Wieman* v. *Updegraff,* 344 U.S. 183, 191 (1952); *Garner* v. *Board of Pub. Works,* 341 U.S. 716, 727-28 (1951) (Frankfurter, J., concurring opinion); *American Comm. Ass'n.* v. *Douds,* 339 U.S. 382, 452-453 (1950), (Black, J., dissenting opinion).

To rule otherwise is to cast a fatal and impossible burden upon the affiant to clarify the unclarifiable at the risk of either punishment (loss of a job, imprisonment or fines) or restriction of protected speech and belief.

In the present case, one who, like the plaintiff, takes the requirements of the Massachusetts oath seriously and conscientiously will be constrained either to refuse the oath altogether or to avoid public disturbances or demonstrations lest she be called upon to make good her oath. This unreasonable restriction of the exercise of First Amendment rights is no more validly required of a public employee than of any ordinary citizen.[27] In *Bond* v. *Floyd*,[28] this Court held that while the state may constitutionally require an oath to support the constitution from its legislators that it does not of its private citizens, this difference in treatment does not justify exclusion from the legislature based on a narrowing of the right of free speech. Nor is it any answer to suggest that a prosecutor's sense of fairness,[29] or a state court's narrow construction of the statute, would save any employee-affiant from the perils and risks adverted to above. For when a criminal or criminally-related statute affecting speech (or even a non-criminal statute which balances benefits versus free speech)[30] is challenged on vagueness grounds, the Constitution does not permit the state to place its employee in a position of impossible choice. In *Baggett* v. *Bullitt*,[31] Mr. Justice White asked rhetorically whether a provision requiring a disclaimer of being a subversive person reached endorsement

---

[27] *Wieman* v. *Updegraff*, 344 U.S. 183 (1952).

[28] 385 U.S. 116 (1966).

[29] As Justice Harlan recognized in *Poe* v. *Ullman*, 367 U.S. 497 (1961), "the State [can] be enabled to maintain at least some substantial measure of compliance with this statute and still obviate any review in this Court, by the device of purely discretionary prosecutorial inactivity." (Harlan, J., dissenting, at 537-538).

[30] *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Speiser* v. *Randall*, 357 U.S. 513 (1958).

[31] 377 U.S. 360 (1964)

or support for Communist candidates for office, the lawyer who represented the Communist party or its members or the journalist who defended the constitutional rights of a party member.[23] The very fact that such a broad and undefined variety of behavior might have to be foresworn by the oath-taker condemned the statute.

With respect to a provision requiring an oath from each teacher that he would "by precept and example, promote respect for the flag,"[24] Justice White stated:

> The range of activities which are or might be deemed inconsistent with the required promise is very wide indeed. The teacher who refused to salute the flag or advocated refusal because of religious beliefs might well be accused of breaching his promise . . . . [citation omitted].
>
> • • •
>
> It will not do to say that the prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains. "If would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human." *Cramp*, supra, at 286-287. Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. Nor should we encourage the casual taking of oaths by upholding the discharge or exclusion from public employment of those with a conscientious and scrupulous regard for such undertakings.[25]

---

[23] Id. at 368.
[24] Id. at 371.
[25] Id. at 371, 373-74.

B. *The Failure To Provide Any Provision For a Hearing Under the Massachusetts Loyalty Oath Statute Renders It Unconstitutional For Failure To Accord Due Process of Law.*

Under the provisions of Mass. Gen. Laws ch. 264, § 14, a public employee may be discharged summarily for failure to swear to the employees' loyalty oath even though the employee is without any opportunity for a public hearing in which to record her reasons for refusing the oath. Yet this Court has recognized that an analogous exercise of Fifth Amendment privilege may in fact result from "mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely."[36]

Although a public employee may in some circumstances be summarily dismissed for incompetence or for insubordination in refusing to respond to questions properly posed,[36] this is not such a case. Here, as the parties have stipulated, plaintiff was summarily discharged without hearing *solely* for refusal to subscribe to the Massachusetts employees' loyalty oath as a condition of continued employment.[37] Numerous other present employees of the Commonwealth will also face summary dismissal if the oath is upheld as valid.[38]

---

[36] *Slochower* v. *Board of Educ.*, 350 U.S. 551, 558 (1956). This Court has on many occasions considered a variety of legitimate reasons why a citizen or employee might refuse to subscribe to an oath or decline to engage in other compelled speech. See e.g., *Keyishian* v. *Board of Regents*, 385 U.S. 589, 601 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 511-12 (1964); *Baggett* v. *Bullitt*, 377 U.S. 360, 367-70 (1964); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943).

[36] See e.g., *Nelson* v. *County of Los Angeles*, 362 U.S. 1 (1960); *Beilan* v. *Board of Education*, 357 U.S. 399 (1958); *Lerner* v. *Casey*, 357 U.S. 468 (1958).

[37] Jt. App. 6.

[38] Id. at 20-25.

> There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy."[39]

Such a summary discharge is a violation of the procedural due process required by the Fourteenth Amendment.

To deny a hearing prior to dismissal for failure to subscribe to such an oath assumes in effect that the applicant or employee is disloyal and therefore disqualified from employment. This assumption in this context partakes of the nature of a conclusive presumption. But, "[t]hat the legislature has no power to enact such a conclusive presumption is established by the authorities, without exception."[40]

Under Mass. Gen. Laws Ch. 264, § 14, such a conclusive presumption is obviously created "without exception." Thus, the inference of disloyalty stands with no opportunity for rebuttal. Without a "proper inquiry" to show that plaintiffs "continued employment . . . [is] inconsistent with the real interest of the State," such summary dismissal (as well as the resulting presumption) violates due process of law.[41]

---

[39] *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191 (1952) (quoting from an address by Judge Learned Hand). See also *Slochower* v. *Board of Educ.*, 350 U.S. 551, (1956); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 (1951).

"But no discharge of a public employee, which operates to bestow a 'badge of disloyalty' or to create a 'built-in inference of guilt', will be permitted without according the right to such hearing as is requisite to due process of law." *Heckler* v. *Shepard*, 243 F. Supp. 841, 845 (E.D. Idaho 1965), striking down Idaho public employees' loyalty oath.

[40] *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 231 (1926), construing a Wisconsin inheritance tax statute.

[41] *Slochower* v. *Board of Educ.*, 350 U.S. 551, 559 (1956).

This inference of disloyalty is impermissible because it follows from no rational relationship between the fact "found", failure to take the oath (which could be for many reasons[42]) and the fact presumed, that the plaintiff is disloyal to the state. Alternatively, the presumption could be construed as fact "found": unwillingness to "oppose" the violent overthrow of the government; fact "presumed": disloyalty to the Commonwealth. The flaw here is a double one since it flows not only from the denial of any chance to rebut the presumption but also from the fatal vagueness inherent in the language of clause two of the Massachusetts oath.[43]

This Court has consistently recognized the necessity for special case in according ample procedural due process when, as here, First Amendment freedoms lie in the balance. In *Speiser* v. *Randall* this Court said:

> ... When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.[44] [citations omitted].

This Court in *Speiser* assumed that the State of California was denying a tax exemption *only* for criminally punishable speech, but still insisted that due process prohibited shifting the burden of proof to the person applying for the

---

[42] Supra at 46.

[43] Cf. *Alder* v. *Board of Educ.*, 342 U.S. 485, 494-96 (1952) where the presumption was not conclusive since a hearing was required. See *United States* v. *Robel*, 389 U.S. 258, 259 (1967) (Brennan, J., concurring opinion), for a thorough analysis of the interconnection between due process denial and vagueness.

[44] 357 U.S. 513, 520 (1958)

benefit. This holding was reached despite the fact that California, unlike Massachusetts, provided for a hearing on the denial of the exemption.

As recently as its last term, this Court ruled that the portion of the Florida employees' loyalty oath requiring the pledge that "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" as a condition of employment was constitutionally defective.[45]

> The second portion of the oath, approved by the District Court, falls within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process. [citations omitted]. That portion of the oath, therefore, cannot stand.[46]

Plaintiff believes that the Florida language in question, which on its face is less vague than that contained in the Massachusetts oath and also less offensive to the First Amendment, the facts of that case, and this Court's holding there, put *O'Connell* and this case on all fours. Like Mrs. Richardson, appellant Connell was first publicly employed, and then discharged within approximately sixty days for her refusal to take an oath. No hearing or inquiry was held in either case. If "[d]ue process may rightly be invoked to condemn Florida's mechanistic approach to the question of proof,"[47] surely Mass. Gen. Laws ch. 264, § 14, must be similarly struck down for its identical failure to provide due process of law to Mrs. Richardson.

---

[45] *Connell* v. *Higginbotham*, 403 U.S. 207 (1971).
[46] Id. at 208-09.
[47] Id. at 209 (Marshall, J., concurring opinion).

POINT III.

THE FIRST AND SECOND CLAUSE OF THE OATH ARE NOT SEVERABLE AND THE COURT BELOW SHOULD BE UPHELD IN STRIKING DOWN THE ENTIRE STATUTE AND OATH.

Although the first clause of the Massachusetts oath, ending with the words "Commonwealth of Massachusetts", might be ruled constitutional if standing alone,[1] the second clause of the oath is clearly unconstitutional for the reasons advanced above. Despite section 6 of chapter 805, Mass. Gen. Laws, of the Acts of 1951, which is a standard severability section, (see Appendix to this brief), the entire loyalty oath must fall in this instance.

Federal courts have long resolved questions of severability when construing state statutes.[2] In so passing upon severability the Federal courts will apply the severability rules of the individual states.[3] The basic Massachusetts rule to determine whether severability is proper is to inquire into the intent of the legislature by examining the content of each act to see if the provisions are so independent of each other that the Court may say that the legislature would have passed one section or clause without the other.[4]

> It is no doubt true ... that the same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others ....
>
> • • •

---

[1] *Knight* v. *Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), aff'd *per curiam*, 390 U.S. 36 (1968). See also *Connell* v. *Higginbotham*, 403 U.S. 207 (1971).

[2] See *e.g.*, *Dorchy* v. *Kansas*, 264 U.S. 286, 291 (1924), approved in *Bell* v. *Maryland*, 378 U.S. 226, 240 (1964). See also, *Whitehill* v. *Elkins*, 389 U.S. 54, 58-59 (1967).

[3] *Morey* v. *Doud*, 354 U.S. 457, 470, n. 16 (1957).

[4] *Warren* v. *Mayor of Charlestown*, 68 Mass. (2 Gray) 84 (1854).

> ... But this must be taken with the limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.
>
> * * *
>
> ... Having come to the conclusion, for the reasons before stated, that the act is incompatible with the letter and spirit of the [c]onstitution in its important provisions, we are constrained to hold *the act* inoperative and void.[5] [emphasis added]

Similarly in this instance there is no way for the federal courts to know whether the Massachusetts legislature would have intended that the oath stand in part alone or be reworded were one section struck down. The District Cour properly recognized this and struck down the entire oath.[6] In fact, if the Attorney General is correct in any sense in arguing that clause one and clause two are to be read together, then the entire oath *must* be struck down because of the infirmity present in clause two.[7]

The impossibility of determining here what the legislature would have desired as an oath once clause two was struck down was generally foreseen by the Supreme Judicial Court of the Commonwealth in another early case re-

---

[5] Id. at 98-9, 107.
[6] 300 F. Supp. 1321, 1323.
[7] See Appellants' Brief at 7-8.

lating to the licensing of hawkers and peddlers[8] in which criminals penalties were provided for failure to obtain the proper licenses.

> If the objectional parts of the statute were separable in such a way that the Legislature would be presumed to have enacted the valid portion without the invalid portion, the statute would be enforced in those parts that are constitutional. [citations omitted] In this case it is impossible to determine what the Legislature would have done if they had noticed that the discrimination between agricultural products of the United States and agricultural products of other countries was unconstitutional. Whether they would have permitted all agricultural products to be peddled without a license, or would have forbidden the peddling of any agricultural products without a license, we have no means of knowing.[9]

It is worthy of note that unlike other statutes found separable, section 14 of chapter 264 was *not* enacted as a "distinct act, entirely separable in its form, in its terms, in its practical operation and in its date of passage." . . . , from other portions of chapter 264.[10] Nor was Mrs. Richardson required to swear to the clauses separately: she was discharged for her refusal to subscribe to the *entire oath*.

In the Massachusetts decision most nearly on point, *Pedlosky* v. *Massachusetts Institute of Technology*,[11] the

---

[8] *Commonwealth* v. *Hana*, 195 Mass. 262 (1907).

[9] Id. at 267.

[10] *Lawton Spinning Co.* v. *Commonwealth*, 232 Mass. 28, 32 (1919). See also *Krupp* v. *Building Comm'r.*, 325 Mass. 686, 692 (1950).

[11] 352 Mass. 127 (1967).

Massachusetts teachers' loyalty oath was struck down on nonconstitutional vagueness grounds. The Supreme Judicial Court, however, while finding only a portion of the oath vague in refusing to sever the oath held, "We have no way of knowing whether the Legislature would have enacted chapter 71, section 30A, without the provision which we conclude to be invalid. We are unable to decide that these provisions are severable."[13]

When the appropriate Massachusetts tests are applied to the oath required by Mass. Gen. Laws ch. 264, § 14, it is clear that the entire oath and the state statute containing it must fall. The oath is an inextricably interconnected whole, so interrelated in its sweep and scope that the conclusion is compelled that the legislature would not have enacted section two without section one.[14] This is a penal statute containing stiff penalties.[15] This Court has properly refused in the past to second-guess legislative intent or to save overly vague statutes even where severability clauses were present.

Nor would the resolution of the straightforward legal issue of Massachusetts legislative purpose be advanced by remanding this matter again to the District Court for disposition. "In cases coming from the lower federal courts, such questions of severability must be determined by this Court."[16] Applying the Massachusetts test for severability, the entire oath must be struck down as the District Court correctly recognized.

---

[13] 352 Mass. 127 at 129 (1967).

[14] See *Sutherland, Statutory Construction*, §§ 2404, 2407, 2418 (3d ed., 1943).

[15] Id. at § 2418.

[16] *Dorchy* v. *Kansas*, 264 U.S. 286, 291 (1924).

Conclusion

The decision of the District Court in twice striking down the Massachusetts general public employees' loyalty oath required by Mass. Gen. Laws ch. 264, § 14, should be upheld. The oath is an overbroad infringement upon plaintiff's First Amendment rights which compells her to speak or act when she may wish to keep silent, and which requires her to keep silent where she may wish to speak or act. The oath is also unconstitutionally vague, in violation of the Fourteenth Amendment, and provides no ascertainable and observable standard of conduct. Likewise, (by summary dismissal without hearing) it deprives plaintiff and all other public employees of the Commonwealth of employment with no pretense of conformity to the procedural due process requirements of the Fourteenth Amendment.

This controversy is far from moot as the District Court found. Since many employees of the Commonwealth await the outcome of this action, abstention for any decision of the Supreme Judicial Court of Massachusetts would neither be appropriate nor relevant.[1] This Court should end Mrs. Richardson's wait of more than two years and uphold the decision of the District Court for the reasons given above.

Respectfully submitted,

HAROLD HESTNES
STEPHEN H. OLESKEY
HALE AND DORR
28 State Street
Boston, Massachusetts 02109
Attorneys for Appellee

Civil Union Liberties
of Massachusetts
3 Joy Street
Boston, Massachusetts 02114
Of Counsel

[1] *Baggett* v. *Bullitt*, 377 U.S. 360, 375-78 (1964). See also *Nostrand* v. *Little*, 362 U.S. 474, 478 (1960), (Douglas, J., dissenting opinion).

APPENDIX
AMENDMENTS TO CONSTITUTION OF UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS GENERAL LAWS

Ch. 264, § 11. *Promotion of anarchy; prohibition*

Whoever by speech or by exhibition, distribution or promulgation of any written or printed document, paper or

pictorial representation advocates, advises, counsels or incites assault upon any public official, or the killing of any person, or the unlawful destruction of real or personal property, or the overthrow by force or violence or other unlawful means of the government of the commonwealth or of the United States, shall be punished by imprisonment in the state prison for not more than three years, or in jail for not more than two and one half years, or by a fine of not more than one thousand dollars; provided, that this section shall not be construed as reducing the penalty now imposed for the violation of any law. It shall be unlawful for any person who shall have been convicted of a violation of this section, whether or not any sentence shall have been imposed, to perform the duties of a teacher or of an officer of administration in any public or private educational institution, and the superior court, in a suit by the commonwealth, shall have jurisdiction in equity to restrain and enjoin any such person from performing such duties thereafter; provided, that any such restraining order or injunction shall be forthwith vacated if such conviction shall be set aside.

Ch. 264, § 14. *Oath or affirmation; form, filing; exemptions*

Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his duties, shall take and subscribe to, under the pains and penalty of perjury, the following oath or affirmation:—

"I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."

Such oath or affirmation shall be filed by the subscriber, if he shall be employed by the state, with the secretary of the commonwealth, if an employee of a county, with the county commissioners, and if an employee of a city or town, with the city clerk or the town clerk, as the case may be.

The oath or affirmation prescribed by this section shall not be required of any person who is employed by the commonwealth or a political subdivision thereof as a physician or nurse in a hospital or other health care institution and is a citizen of a foreign country.

Ch. 264, § 15. *Violation of section 14; penalty*

Violation of section fourteen shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both.

Ch. 268, § 1. *Perjury*

Whoever, being lawfully required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, wilfully swears or affirms falsely in a matter material to the issue or point in question, or whoever, being required by law to take an oath or affirmation, wilfully swears or affirms falsely in a matter relative to which such oath or affirmation is required, shall be guilty of perjury. Whoever commits perjury on the trial of an indictment for a capital crime shall be punished by imprisonment in the state prison for life or for any term of years, and whoever commits perjury in any other case shall be punished by imprisonment in the state prison for not more than twenty years or by by a fine of not more than one thousand dollars or by imprisonment in jail for not more than two and one half years, or by both such fine and imprisonment in jail.

ACTS, 1951. — CHAP. 805.

Section 6. If any provision, phrase or clause of this chapter, or the application thereof to any person or cir-

cumstance, is held invalid, such invalidity shall not affect other provisions, phrases or clauses or applications of this chapter which can be given effect without the invalid provision, phrase or clause or application, and to this end the provisions, phrases and clauses of this chapter are declared to be severable.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 69-302-G

LUCRETIA PETROS RICHARDSON, *Plaintiff*,

v.

DR. JONATHAN O. COLE, Superintendent, Boston State Hospital, and DR. MILTON GREENBLATT, Commissioner, Department of Mental Health, Commonwealth of Massachusetts, *Defendants*.

Before ALDRICH, *Circuit Judge*,
JULIAN and GARRITY, *District Judges*.

OPINION

June 26, 1969

ALDRICH, *Circuit Judge*. The plaintiff, after six weeks of employment by the Commonwealth of Massachusetts as a research sociologist at the Boston State Hospital, was informed that she would have to take the oath required of all public employees by Mass. G.L. c. 264 § 14. Upon her refusal, on the assertion that the oath was unconstitutional, she was paid for her services to date and told that no further compensation could be made. She then brought the present suit under 28 U.S.C. § 2281, requesting the appointment of three-judge district court and a declaration of the statute's unconstitutionality. Named respondents are the Superintendent of the hospital and the Commissioner of

the Department of Mental Health, but the Commonwealth was properly served and defends through the Attorney General, and for convenience we will refer to the Commonwealth as the respondent. No question of standing is raised.

The statutorily required oath is as follows.

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."

A "violation" of section 14, which presumably means a failure to "live up" to the oath, since its phraseology is in the future tense, is a felony. Mass. G.L. c. 264 § 15.

The oath can be conveniently divided into two parts, the first ending with the word "Massachusetts." Plaintiff makes an esoteric analysis of the phrase "uphold and defend" from which she argues that even this part is improper. We consider this argument foreclosed by *Knight* v. *Board of Regents*, S.D.N.Y., 1967, 269 F.Supp. 339, *aff'd* 390 U.S. 36, ...While the obligation in *Knight* was to "support" the constitution, traditionally the words "support," "uphold," and "defend" may be regarded as equivalents. *See*, Report of the Attorney General (of Mass.) (1967) pp. 206-07.

Plaintiff takes an equally esoteric word-by-word approach to the second part which, if we were to follow it, would make almost any sentence in the English language ambiguous. A criminal statute is to be strictly interpreted, but this does not mean that common sense is to be jettisoned. In at least one aspect, however, we must agree with plaintiff's position. We find the phrase "oppose the overthrow" fatally vague and unspecific.

The word "oppose" has a number of common meanings, running from the negative, "not favor," or "refrain from," to the affirmative, viz., to take active steps to restrain the conduct of others. Had the statute plainly said the former, we might find it difficult to support the plaintiff's contention that the First Amendment forbade the state from imposing such restrictions upon its employees. This would involve the question whether what, for the ordinary citizen, may be free speech if the approval of violence is sufficiently benign, *cf. Brandenberg* v. *Ohio*, 395 U.S. 444, . . . , (6/10/69), may be forbidden to public employees. *Cf. Garner* v. *Board of Public Works of Los Angeles*, 1951, 341 U.S. 716, ... We might be particularly led to such a restricted meaning of "oppose" by the fact that the statute reads "overthrow" as distinguished from "attempt to overthrow." Obviously if one is speaking in terms of making active opposition to someone else's conduct, it is too late to oppose after there has been an overthrow—the opposition must be to the attempt. On the other hand, if one is speaking of one's personal standards one can favor an overthrow, or not favor it.

However, there is another possible, and in the opinion of at least one member of this court, even more plausible interpretation of the oath. This meaning has, in fact, been embraced by the Commonwealth. In its brief it says,

> "[I]n the event that a clear and present danger arose of the actual overthrow of the government, ... the public employee [would] be required to use reasonable means at his disposal to attempt to thwart that effort. What he might do in such circumstances could range from the use of physical force to speaking out against the downfall of the government. The kind

> of response required would be commensurate with the circumstances and with the employee's ability, his training, and the means available to him at the time."

In oral argument the Deputy Assistant Attorney General amplified the Commonwealth's position. There were, he asserted, three standards of obligation to take active steps to "oppose" the overthrow of the government by force or violence. The ordinary citizen who has taken no oath has an obligation to act *in extremis;* a person who has taken the first part of the present oath would have a somewhat larger obligation, and one who has taken the second part has one still larger.

We need not explore these undefined boundaries. The very fact that such varied standards, as well as the alternative one of purely negative behavior earlier adverted to, can be suggested is enough to condemn the language as hopelessly vague. It is, of course, well settled that employment cannot be conditioned upon an unintelligible oath. *Cf. Connally* v. *General Constr. Co.*, 1926, 269 U.S. 385, 391 . . . ; *Cramp* v. *Board of Instruction of Orange County*, 1961, 368 U.S. 278, 287, ...

Plaintiff is entitled to a declaration that the statute is unconstitutional. She is also entitled to the injunction requested, forbidding the defendants from prohibiting her from discharging her duties at the Boston State Hospital insofar as such prohibition is based upon her refusal to take the oath required by Mass. G.L. c. 264 § 14. We cannot grant her request for back pay.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 69-302-G

LUCRETIA PETEROS RICHARDSON, *Plaintiff*,

v.

DR. JONATHAN O. COLE, Superintendent, Boston State Hospital, and DR. MILTON GREENBLATT, Commissioner, Department of Mental Health, Commonwealth of Massachusetts, *Defendants*.

Before ALDRICH, *Circuit Judge*,
JULIAN and GARRITY, *District Judges*.

JUDGMENT AND INJUNCTION

June 26, 1969

This cause came on to be heard upon the complaint of Lucretia Peteros Richardson. The Court, upon consideration of the complaint, the answer of the defendants, the stipulation of facts, the briefs and arguments of counsel for the plaintiffs and the defendants, and for the reasons stated in its opinion filed herewith,

ORDERS, ADJUDGES and DECREES:

a) that section 14 of chapter 264 of the General Laws of Massachusetts violates the First Amendment of the Constitution of the United States and is therefore invalid; and

b) that the defendants be, and they are hereby, permanently enjoined from prohibiting the plaintiff from discharging her duties at the Boston State Hospital insofar as such prohibition is based upon her refusal to take the oath required by said section 14 of chapter 264 of the General Laws of Massachusetts.

BAILEY ALDRICH
ANTHONY JULIAN
W. ARTHUR GARRITY, JR.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 69-302-G

LUCRETIA PETEROS RICHARDSON, *Plaintiff*,

v.

DR. JONATHAN O. COLE, Superintendent, Boston State Hospital, and DR. MILTON GREENBLATT, Commissioner, Department of Mental Health, Commonwealth of Massachusetts, *Defendants*.

Before ALDRICH, *Circuit Judge*,
JULIAN and GARRITY, *District Judges*.

DETERMINATION ON THE QUESTION OF MOOTNESS

July 1, 1970

PER CURIAM. Following the order of the Supreme Court of the United States vacating the judgment herein and remanding the case for a determination whether the causes on appeal (Nos. 679 and 774, October Term 1969) have become moot, the court held a hearing and received evidence, including testimony of the plaintiff, and a supplementary stipulation of undisputed facts relating to questions of mootness. At the hearing plaintiff filed a memorandum of law and the attorneys for plaintiff and defendants made oral arguments. Thereafter defendants filed a supplemental brief and plaintiff a reply brief. On the basis of the supplementary stipulation and evidence received, and upon consideration of the arguments and memoranda of law, the court makes the following findings:

Constitutionality of Mass. G.L. c. 264, §14

1. Plaintiff has retracted her suggestion of mootness made in the Supreme Court, explaining that her motion there to dismiss appeal No. 679 on the ground of mootness

was predicated on a misunderstanding that the filling of the "job slot" of an occupational therapist which she had been occupying precluded her further employment.[1] It is now clear, however, both from Dr. Cole's affidavit filed in the Supreme Court and from the supplementary stipulation filed in this court on April 24, 1970, that the project for which she was originally hired is still on-going and defendants are ready and willing to employ her on a consulting basis.

2. Plaintiff moved from Massachusetts to New York City in September 1969. For approximately one month before leaving she was hired by the defendants as a consultant to be paid at the rate of $15 per consulting session.[2] This is the specific employment opportunity which is still open to her provided she takes the oath required of all state employees by Mass. G.L. c. 264, § 14. Plaintiff is willing to come Boston on an average of two days per week for the purpose of completing the research project which she started.

Therefore, in our opinion, plaintiff's claim for an injunction forbidding the defendants from barring her reemployment insofar as such prohibition is based upon her refusal to take the oath required by Mass. G.L. c. 264, § 14, is not moot.

Claim for Damages

3. The facts regarding plaintiff's claim for back pay have been clarified by the supplementary stipulation. Contrary to the allegation in paragraph 6 of the complaint, plaintiff has been compensated in full for work performed

---

[1] Defendants have continued to maintain that the case is not moot.

[2] Plaintiff was not required to sign the state employee loyalty oath as a condition of this employment, evidently because of defendant Cole's desire to observe this court's opinion dated June 26, 1969. But there has been no waiver of the requirement generally and the original stipulation of the parties, in paragraph 9 of the stipulation of facts filed May 16, 1969, that plaintiff's refusal to take the oath is an absolute bar to her further employment has not been modified.

up to November 25, 1968, when she was discharged for refusal to subscribe to the loyalty oath. Upon being discharged plaintiff volunteered to work on the project without compensation and did so full time for a period of approximately one month after November 25, 1968 and continued to work on a volunteer basis without pay at about one-third full time from January 27, 1969 until the decision of the district court entered June 26, 1969. For approximately one month following June 26, 1969 plaintiff attempted unsuccessfully to secure her former position at the Boston State Hospital. On August 4, 1969 she resumed work on the project on a consulting basis at the rate of $15 per consulting session and was to work five sessions per week. Four weeks later she moved to New York, where her husband is employed.

4. In early October she submitted a bill to defendants for $300 for services she had rendered as a consultant. Due to the form of the invoice, payment was delayed. Payment has not yet been made but only because the parties desired to preserve the status quo for purposes of this case. Defendants do not resist payment. Defense counsel stated at the hearing and in the last sentence of the supplemental brief for the defendants filed May 18, 1970 that if the bill is resubmitted by plaintiff or her counsel, it will be promptly processed for payment.

5. At the hearing and in a memorandum filed April 27, 1970 and a reply brief filed May 25, 1970 plaintiff claims damages of approximately $5000 for breach of contract of employment, which she testified she expected would last for approximately one year when she commenced working on September 30, 1968. The court will not entertain this claim for two reasons: (a) The complaint seeks damages only for "her uncompensated employment at Boston State Hospital" and plaintiff never moved to amend the complaint; (b) Plaintiff's testimony at the hearing demon-

strated that there is no substance to her belated claim for breach of contract and the court would not allow a motion to amend the complaint if presented. Plaintiff testified that the program which commenced on September 30, 1968 was of indefinite duration and a kind of pilot study, the expansion of which she and defendants hoped would be financed by a grant from a private foundation.

Therefore, in our opinion, plaintiff's claim for damages has become moot.

(s) BAILEY ALDRICH
Circuit Judge
(s) ANTHONY JULIAN
District Judge
(s) W. ARTHUR GARRITY JR.
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 69-302-G

LUCRETIA PETEROS RICHARDSON, *Plaintiff*,

v.

DR. JONATHAN O. COLE, Superintendent, Boston State Hospital, and DR. MILTON GREENBLATT, Commissioner, Department of Mental Health, Commonwealth of Massachusetts, *Defendants*.

Before ALDRICH, *Circuit Judge*,
JULIAN and GARRITY, *District Judges*.

REINSTATED JUDGMENT AND INJUNCTION

July 1, 1970

This cause came on to be heard for a determination whether the case is moot, judgment entered herein on

June 26, 1969 having been vacated by order of the Supreme Court of the United States and the case having been remanded for a determination of mootness, and the court having held an evidentiary hearing and considered the briefs and arguments of counsel and having determined in its opinion filed herewith that the case is not moot,

ORDERS, ADJUDGES and DECREES:

(a) that section 14 of chapter 264 of the General Laws of Massachusetts violates the First Amendment of the Constitution of the United States and is therefore invalid; and

(b) that the defendants be, and they are hereby permanently enjoined from prohibiting the plaintiff from discharging her duties at the Boston States Hospital insofar as such prohibition is based upon her refusal to take the oath required by said section 14 of chapter 264 of the General Laws of Massachusetts.

(s) BAILEY ALDRICH
Circuit Judge

(s) ANTHONY JULIAN
District Judge

(s) W. ARTHUR GARRITY, JR.
District Judge

SUPREME COURT OF THE UNITED STATES

COLE, BOSTON STATE HOSPITAL SUPERINTENDENT, ET AL. *v.* RICHARDSON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 679. Decided March 16, 1970*

300 F. Supp. 1321, vacated and remanded.

PER CURIAM.

The judgment is vacated and the cases are remanded to the United States District Court for the District of Massachusetts to determine whether these cases have become moot.

* Together with No. 774, *Richardson* v. *Cole, Boston State Hospital Superintendent, et al.*, also on appeal from the same court.

COLE, STATE HOSPITAL SUPERINTENDENT, ET AL. *v.* RICHARDSON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 70-14. Argued November 16, 1971—Decided April 18, 1972

Appellee's employment at the Boston State Hospital was terminated when she refused to take the following oath required of all public employees in Massachusetts: "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method." Appellee challenged the constitutionality of the oath statute. A three-judge District Court concluded that the attack on the "uphold and defend" clause was foreclosed by *Knight* v. *Board of Regents*, 390 U. S. 36, but found the "oppose the overthrow" clause "fatally vague and unspecific" and thus violative of the First Amendment. In response to a remand from this Court, the District Court concluded that the case was not moot, and reinstated its earlier judgment. *Held:* The Massachusetts oath is constitutionally permissible. Pp. 679–687.

(a) The oath provisions of the United States Constitution, Art. II, § 1, cl. 8, and Art. VI, cl. 3, are not inconsistent with the First Amendment. Pp. 681–682.

(b) The District Court properly held that the "uphold and defend" clause, a paraphrase of the constitutional oath, is permissible. P. 683.

(c) The "oppose the overthrow" clause was not designed to require specific action to be taken in some hypothetical or actual situation but was to assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our government. Pp. 683–685.

(d) The oath is not void for vagueness. Perjury, the sole punishment, requires a knowing and willful falsehood, which removes the danger of punishment without fair notice; and there is no problem of punishment inflicted by mere prosecution, as there has been no prosecution under the statute since its enactment nor has any been planned. Pp. 685–686.

(e) There is no constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means, and therefore there is no requirement that one who refuses to take Massachusetts' oath be granted a hearing for the determination of some other fact before being discharged. Pp. 686–687.

Reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, and BLACKMUN, JJ., joined. STEWART and WHITE, JJ., filed a concurring opinion, *post*, p. 687. DOUGLAS, J., filed a dissenting opinion, *post*, p. 687. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 691. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Walter H. Mayo III, Assistant Attorney General of Massachusetts, argued the cause for appellants. With him on the brief was *Robert H. Quinn*, Attorney General.

Stephen H. Oleskey argued the cause for appellee *pro hac vice*. With him on the brief was *Harold Hestnes*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In this appeal we review the decision of the three-judge District Court holding a Massachusetts loyalty oath unconstitutional.

The appellee, Richardson, was hired as a research sociologist by the Boston State Hospital. Appellant Cole is superintendent of the hospital. Soon after she entered on duty Mrs. Richardson was asked to subscribe to the oath required of all public employees in Massachusetts. The oath is as follows:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States

of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method." [1]

Mrs. Richardson informed the hospital's personnel department that she could not take the oath as ordered because of her belief that it was in violation of the United States Constitution. Approximately 10 days later appellant Cole personally informed Mrs. Richardson that under state law she could not continue as an employee of the Boston State Hospital unless she subscribed to the oath. Again she refused. On November 25, 1968, Mrs. Richardson's employment was terminated and she was paid through that date.

---

[1] The full text of the two relevant statutes is as follows:

Mass. Gen. Laws, c. 264, § 14. *Oath or affirmation; form; filing; exemptions*

"Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his duties, shall take and subscribe to, under the pains and penalty of perjury, the following oath or affirmation:—

"'I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method.'

"Such oath or affirmation shall be filed by the subscriber, if he shall be employed by the state, with the secretary of the commonwealth, if an employee of a county, with the county commissioners, and if an employe of a city or town, with the city clerk or the town clerk, as the case may be.

"The oath or affirmation prescribed by this section shall not be required of any person who is employed by the commonwealth or a political subdivision thereof as a physician or nurse in a hospital or other health care institution and is a citizen of a foreign country."

C. 264, § 15. *Violation of section 14; penalty*

"Violation of section fourteen shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both."

In March 1969 Mrs. Richardson filed a complaint in the United States District Court for the District of Massachusetts. The complaint alleged the unconstitutionality of the statute, sought damages and an injunction against its continued enforcement, and prayed for the convocation of a three-judge court pursuant to 28 U. S. C. §§ 2281 and 2284.

A three-judge District Court held the oath statute unconstitutional and enjoined the appellants from applying the statute to prohibit Mrs. Richardson from working for Boston State Hospital.[2] The District Court found the attack on the "uphold and defend" clause, the first part of the oath, foreclosed by *Knight* v. *Board of Regents*, 269 F. Supp, 339 (SDNY 1967), aff'd, 390 U. S. 36 (1968). But it found that the "oppose the overthrow" clause was "fatally vague and unspecific," and therefore a violation of First Amendment rights. The court granted the requested injunction but denied the claim for damages.

Appeals were then brought to this Court under 28 U. S. C. § 1253. We remanded for consideration of whether the case was moot in light of a suggestion that Mrs. Richardson's job had been filled in the interim. 397 U. S. 238 (1970). On remand, the District Court concluded that Mrs. Richardson's position had not been filled and that the hospital stood ready to hire her for the continuing research project except for the problem of the oath. In an unreported opinion dated July 1, 1970, it concluded that the case was not moot and reinstated its earlier judgment. Appellants again appealed, and we noted probable jurisdiction. 403 U. S. 917 (1971).

We conclude that the Massachusetts oath is constitutionally permissible, and in light of the prolonged liti-

---

[2] *Richardson* v. *Cole*, 300 F. Supp. 1321 (Mass. 1969).

gation of this case we set forth our reasoning at greater length than previously.

A review of the oath cases in this Court will put the instant oath into context. We have made clear that neither federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments respectively, as for example those relating to political beliefs. *Law Students Research Council* v. *Wadmond*, 401 U. S. 154 (1971); *Baird* v. *State Bar of Arizona*, 401 U. S. 1 (1971); *Connell* v. *Higginbotham*, 403 U. S. 207, 209 (1971) (MARSHALL, J., concurring in result). Nor may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as the following: criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office. *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961). Employment may not be conditioned on an oath denying past, or abjuring future, associational activities within constitutional protection; such protected activities include membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose. *Whitehill* v. *Elkins*, 389 U. S. 54 (1967); *Keyishian* v. *Board of Regents, supra; Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952). Thus, last Term in *Wadmond* the Court sustained inquiry into a bar applicant's associational activities only because it was narrowly confined to organizations that the individual had known to have the purpose of violent overthrow of the government and whose purpose the individual shared. And, finally, an oath may not be so vague that " 'men of common in-

telligence must necessarily guess at its meaning and differ as to its application; [because such an oath] violates the first essential of due process of law.'" *Cramp* v. *Board of Public Instruction*, 368 U. S., at 287. Concern for vagueness in the oath cases has been especially great because uncertainty as to an oath's meaning may deter individuals from engaging in constitutionally protected activity conceivably within the scope of the oath.

An underlying, seldom articulated concern running throughout these cases is that the oaths under consideration often required individuals to reach back into their pasts to recall minor, sometimes innocent, activities. They put the government into "the censorial business of investigating, scrutinizing, interpreting, and then penalizing or approving the political viewpoints" and past activities of individuals. *Law Students Research Council* v. *Wadmond*, 401 U. S., at 192 (MARSHALL, J., dissenting).

Several cases recently decided by the Court stand out among our oath cases because they have upheld the constitutionality of oaths, addressed to the future, promising constitutional support in broad terms. These cases have begun with a recognition that the Constitution itself prescribes comparable oaths in two articles. Article II, § 1, cl. 8, provides that the President shall swear that he will "faithfully execute the Office . . . and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." Article VI, cl. 3, provides that all state and federal officers shall be bound by an oath "to support this Constitution." The oath taken by attorneys as a condition of admission to the Bar of this Court identically provides in part "that I will support the Constitution of the United States"; it also requires the attorney to state that he will "conduct [himself] uprightly, and according to law."

Bond v. *Floyd*, 385 U. S. 116 (1966), involved Georgia's statutory requirement that state legislators swear to "support the Constitution of this State and of the United States," a paraphrase of the constitutionally required oath. The Court there implicitly concluded that the First Amendment did not undercut the validity of the constitutional oath provisions. Although in theory the First Amendment might have invalidated those provisions, approval of the amendment by the same individuals who had included the oaths in the Constitution suggested strongly that they were consistent. The Court's recognition of this consistency did not involve a departure from its many decisions striking down oaths that infringed First and Fourteenth Amendment rights. The Court read the Georgia oath as calling simply for an acknowledgment of a willingness to abide by "constitutional processes of government." 385 U. S., at 135. Accord, *Knight* v. *Board of Regents*, 390 U. S. 36 (1968) (without opinion). Although disagreeing on other points, in *Wadmond, supra*, all members of the Court agreed on this point. MR. JUSTICE MARSHALL noted there, while dissenting as to other points,

> "The oath of constitutional support requires an individual assuming public responsibilities to affirm . . . that he will endeavor to perform his public duties lawfully." 401 U. S., at 192.

The Court has further made clear that an oath need not parrot the exact language of the constitutional oaths to be constitutionally proper. Thus in *Ohlson* v. *Phillips*, 397 U. S. 317 (1970), we sustained the constitutionality of a state requirement that teachers swear to "uphold" the Constitution. The District Court had concluded that the oath was simply a " 'recognition that ours is a government of laws and not of men,' " and that the oath involved an affirmation of "organic law" and rejection of "the use of force to overthrow the govern-

ment." *Ohlson* v. *Phillips*, 304 F. Supp. 1152 (Colo. 1969).

The District Court in the instant case properly recognized that the first clause of the Massachusetts oath, in which the individual swears to "uphold and defend" the Constitutions of the United States and the Commonwealth, is indistinguishable from the oaths this Court has recently approved. Yet the District Court applied a highly literalistic approach to the second clause to strike it down. We view the second clause of the oath as essentially the same as the first.

The second clause of the oath contains a promise to "oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method." The District Court sought to give a dictionary meaning to this language and found "oppose" to raise the specter of vague, undefinable responsibilities actively to combat a potential overthrow of the government. That reading of the oath understandably troubled the court because of what it saw as vagueness in terms of what threats would constitute sufficient danger of overthrow to require the oath giver to actively oppose overthrow, and exactly what actions he would have to take in that respect. Cf. *Ohlson* v. *Phillips*, 304 F. Supp., at 1154 and n. 4.

But such a literal approach to the second clause is inconsistent with the Court's approach to the "support" oaths. One could make a literal argument that "support" involves nebulous, undefined responsibilities for action in some hypothetical situations. As Mr. Justice Harlan noted in his opinion concurring in the result on our earlier consideration of this case,

> "[A]lmost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel. . . . [But such an approach] amounts to